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IN THE

Supreme Court of the United States

October Term, 1962

No. 593

EDWARD C. ST. CLAIR, individually and in his own right as a person directly aggrieved and on behalf of all others similarly situated and on behalf of the PEOPLE OF THE STATE OF NEW YORK as a citizen and taxpayer thereof,

Appellant,

against

YONKERS RACEWAY, INC., ROOSEVELT RACEWAY, INC., MID-STATE RACEWAY, INC., SARATOGA HARNESS RACING ASSOCIATION, INC., BUFFALO TROTTING ASSOCIATION, INC., GENESEE-MONROE RACING ASSOCIATION, INC.,

Defendants-Respondents,

and

ROBERT A. GLASSER, SPENCER B. EDDY, JAMES A. FARLEY, as and constituting the STATE HARNESS RACING COMMISSION, JOSEPH E. MURPHY, FREDERICK R. CLARK, IRA J. PALESTINO as and constituting the STATE TAX COMMISSION, ARTHUR LEVITT as Comptroller of the State of New York,

and

LOUIS J. LEFKOWITZ as Attorney General of the State of New York,

Defendants.

BRIEF OF RESPONDENT, YONKERS RACEWAY, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BLUM, JOLLES, HAIMOFF, SZABAD & GERSEN,
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Yonkers Raceway, Inc.

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BRIEF OF RESPONDENT, YONKERS RACEWAY, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary

The New York Court of Appeals (13 N.Y. 2d 72), affirming the decision of the Appellate Division, Fourth Department, and the Supreme Court, Westchester County, held

that a taxpayer was without standing to challenge the constitutionality of an act of the Legislature of the State of New York which, in effect, provided for the reduction of the parimutuel revenue tax imposed on harness racing tracks which completed capital construction projects approved by the State Harness Racing Commission.

The petition for a writ of *certiorari* should be denied.

I

No substantial federal question is involved, and indeed, the record presents no federal question whatsoever.

As the Court of Appeals pointed out, the "simple question presented" was "whether the complaint was properly dismissed on the ground that plaintiff (petitioner here) lacks legal capacity to sue" (13 N. Y. 2d at p. 75).

Petitioner admitted in the New York Courts that under the law of New York, a taxpayer may not contest the constitutionality of a statute. In his Brief in the Court of Appeals, he conceded that the "New York case law" is "to the effect that a citizen of the state, merely as such, may not contest the validity of a statute".

The thrust of the petitioner's argument was that this rule should be abandoned because it was "archaic, outmoded, against the weight of modern legal authority and based solely upon the erroneous assumptions of the divine rights of kings".

In rejecting this contention, the Court of Appeals ruled that petitioner was attempting, not only to change the law of the State of New York, but also the law of the United States. In the Court's opinion, it was stated (13 N. Y. 2d at p. 76):

> "Once again we are presented with an attempt to change the law of this State, which is also the law of the United States of America. We have always held that the constitutionality of a State statute may be

> tested only by one personally aggrieved thereby, and then only if the determination of the grievance requires a determination of constitutionality. Under that ruling an unaggrieved citizen taxpayer, such as appellant, lacks standing to challenge a statute's constitutional validity."

The Court, in its opinion relied upon the opinion of Mr. Justice Black in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 132, in which the following fundamental principle was enunciated (13 N. Y. 2d, pp. 76-77):

> "Our decision that the complaining companies lack standing to sue does not rest upon a mere formality. We rest it upon reasons deeply rooted in the constitutional divisions of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public."

This rule, rejecting the right of taxpayers as such to challenge the constitutionality of legislative enactments, has been repeatedly enforced by this court (*Massachusetts* v. *Mellon*, 262 U. S. 447; *Ex parte Levitt*, 302 U. S. 633; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123).

This has been the law of the United States since *Marbury* v. *Madison*, 1 Cranch (United States) 137 and of the State of New York since 1858 (*Doolittle* v. *Supervisors of Broome County*, 18 N. Y. 155).

The rule of the *Doolittle* case had been reaffirmed by the Court of Appeals in *Bull* v. *Stichman*, 294 N. Y. 516, in which the arguments and authorities urged by the petitioner in the case at bar, were rejected by the Court of Appeals. This doctrine has now been merely reasserted by the Court of Appeals in the case now before the Court. In the opinion of the Court in the case at bar, it was stated (13 N. Y. 2d, p. 76):

> "Thus we have found anew that the rationale propounded in *Doolittle* v. *Supervisors of Broome*

County, 18 N. Y. 155, and *Schieffelin* v. *Komfort*, 212 N. Y. 520, remains sound today. It seems to us proper 'that the courts of this State have denied the right of a citizen and taxpayer to bring before the court for review the acts of another department of government simply because he is one of many such citizens and taxpayers' (*Schieffelin* v. *Komfort*, 212 N. Y. 520, 537)."

Petitioner urges that he has been deprived of property without due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment because, without any interest in the matter other than that of a taxpayer, he has been precluded from challenging the constitutionality of a state statute. No authority is cited for this extraordinary doctrine and of course none can be found. It has never previously been suggested that the Constitution of the United States protects the "right" of litigious citizens to protest the constitutionality of statutes in which they have no interest.

II

Lest the Court consider that some grave wrong has been perpetrated, the relevant facts, though not relevant, may be briefly reviewed. The statute, with which petitioner is so much concerned, was enacted in 1956 and in effect provided that any Harness Racing Track could construct an improvement with the approval of the Harness Racing Commission. If thereafter the revenues to the State from the pari-mutuel betting increased over the revenues in 1955 which was designated the "base year", the track would be entitled to a reduction in the tax rate applicable to the increased revenues until such time as the tax reduction equalled in amount the cost of the improvement certified by the Harness Racing Commission.

The benefits to the State of New York from this legislation have been substantial. In 1955, the pari-mutuel

revenue tax paid by Yonkers Raceway to the State of New York was $9,486,677, then the all time high. Following the completion of a major improvement at Yonkers Raceway in 1958, the revenues increased enormously with the result that the pari-mutuel tax which Yonkers Raceway has paid to the State of New York in the three years prior to 1961, when the action was brought, averaged more than $17,000,000 per annum.

Other race tracks have similarly paid greatly increased revenues into the State treasury as a result of the capital improvements completed. In 1955, the total revenue was $25,640,225; in 1961, revenues were $40,763,357. Moreover, the construction credits have now expired with the result that commencing in 1963, the State will derive additional revenues equal to $8,000,000 per annum.

In the face of this evidence, there is no justification for the petitioner's concern that state revenues have been depleted. On the contrary, they have multiplied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BLUM, JOLLES, HAIMOFF, SZABAD & GERSEN,
Attorneys for Defendant-Respondent,
Yonkers Raceway, Inc.

LOUIS HAIMOFF,
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